

D2 end
10% to 60% of a fermented dairy product;
0.01% to 25% of sour cream or dairy cream containing 25% to 45% of fatty substances;

0.01% to 35% of a texturizing agent;
0.01% to 20% of an aromatic product; and
0.01% to 0.5% of salt;

wherein the cream composition is disposed on at least one layer of a biscuit and wherein the cream composition must be refrigerated to provide a shelf life of at least 45 days.

D3
46. (Amended) A food product comprising the cream composition of claim 26 disposed between two layers of biscuit each of which comprises cake, gingerbread, brioche roll, or Viennese bread or buns.

REMARKS

Claims 26-36 and 38-46, as amended, are pending for the Examiner's review and consideration. The title has been amended to reflect that the process claims were canceled pursuant to a restriction requirement. Claim 30 has been amended to further recite a preferred embodiment where the milk derivative is present in an amount of 15 weight percent to about 20 weight percent (*See, e.g.*, Specification at page 4, lines 5-6). Claim 38 has been amended to clarify that refrigeration is required to obtain a suitable shelf life (*See, e.g.*, Specification at page 7, lines 5-11). Claim 46 has been amended to recite a preferred embodiment where the biscuit material of the invention comprises cake, gingerbread, brioche roll, or Viennese bread or buns (*See, e.g.*, Specification at page 4, lines 1-3). No new matter has been added by way of these amendments, such that their entry at this time is warranted. A marked up version of the amended claims is attached as Appendix A. A clean set of the pending claims is attached hereto as Appendix B.

Claims 26, 29-30, 32-35, 38, and 46 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 4,762,725 to Player et al. ("Player") on pages 2-4 of the Office Action. Player is alleged to teach 10-20% milk derivatives (Examples 1-2), 8-30% sugars (Examples 1-2), 10-60% fermented dairy product (27% cheese powders in Example 1), 0.01% to 25% sour cream with 36% fat (5% sour cream in Example 2), 0.01 to 35% texturing agent such as maltodextrin (7% in Example 2), and 0.01 to 20% flavor (jalapeno powder in Example 2), with the "cream" being disposed on a biscuit (Col. 13, lines 29-38).

Player is also alleged to teach salt along with the cheese powders, but is silent on a specific amount. This is alleged to be an obvious result-effective variable based on flavor.

Initially, Player is explicitly *non-aqueous* (Col. 1, lines 23-25 and Col. 3, line 22), while the present invention is clearly aqueous. In particular, independent claims 26 and 38 recite sour or dairy creams, which are well known to contain some water content distinct from that taught by Player. Additionally, claims 28 and 42 recite a water activity, which of necessity inherently recites the presence of some degree of water, and claim 31 explicitly recites a variety of fermented dairy products that are actually diluted in water or milk. For this reason alone, Player is inapplicable to the claimed invention and in fact teaches the skilled artisan directly away from the present invention.

Player is also deficient in that it simply does not disclose sour cream having 25 to 45% fatty substances as alleged in the Office Action. The Office Action claims that "Sour Cream 36 (Mid America)" is sour cream. On the contrary, a glance at the chart of Example 2 clearly indicates that the composition includes three (3) types of cheese powders including powders of parmesan, sour cream, and blue cheese. If the amounts of the three types in the right-hand column are added they result in the sum total of 32.3% cheese powder. Thus, it is clear that, although Player indeed discloses cheese powders, it simply does **not** teach sour cream--but only in powdered form as a cheese powder. Player contains absolutely no further disclosure--and not even a remote suggestion--of sour cream, as presently recited. Moreover, Player does not teach the recited amount of molten fat since its sour cream is simply a powder and cannot have any molten portion as a powder. Thus, Player does not teach one of the recited features of claims 26 and 38.

Further, Player does not teach the amount of salt required for a suitable cream composition as presently recited. Indeed, since Player teaches away from the present invention by disclosing a *non-aqueous spread*, and one that does not have *sour cream* as presently recited, it would not have provided the proper motivation for one of ordinary skill in the art to simply optimize the amount of salt presently recited based on Player's deficient teachings. This inability to simply optimize the amount of salt is particularly apparent when considering that Player teaches a completely different vegetable oil/lipid based spread that is not even refrigerated, as recited in claim 38.

Due to all these differences, it is clear that the organoleptic properties of Player's composition is completely different from the composition that is claimed by applicants. Rather than being a room temperature stable amorphous paste, applicants' composition is a fresher-tasting dairy-type composition that is perceived to be more natural

than processed. This type composition finds much greater consumer acceptance than the amorphous pastes of the reference.

Moreover, Example 2 does not even teach the recited amount of milk derivative. The present invention clearly defines "milk derivative" to mean powdered unskimmed milk, powdered skimmed milk, or sweetened evaporated milk on the paragraph bridging pages 3-4 of the specification. Example 2 only contains 5% milk derivative, well below the 10 to 20% presently recited. While Example 1 does indeed contain 10% skim milk solids, it fails to teach various claimed features of the present invention.

Independent claim 38 also recites the transition language "consisting essentially of," which excludes components that would materially affect the basic and novel characteristics of the claimed invention. *Atlas Powder Co. v. E.I. du Pont de Nemours & Co.*, 750 F.2d 1569 (Fed. Cir. 1984). In this instance, the transition language excludes the stabilizers and lipids of Player, which are required to provide a material stable at normal temperature, *i.e.*, one that does not require refrigeration to have a shelf life measured in days. Adding such lipids and/or stabilizers of Player would result in an unsuitable cream composition as presently recited. Claim 46 also recites specific biscuit products, none of which are taught by Player. Player at best teaches sandwich and cracker creams and extrudable confectionary centers, while claim 46 now recites the cream composition is disposed between two layers of biscuit each of which comprises cake, gingerbread, brioche roll, or Viennese bread or buns.

For these reasons, Player does not teach the claimed invention. Thus, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since no *prima facie* case of obviousness has been stated.

Claims 27 and 44 were rejected under 35 U.S.C. § 103(a) as being obvious over Player in view of EP No. 0,666,031 to Lauro et al. ("Player") on pages 4-5 of the Office Action. Lauro is alleged to remedy the deficiencies of Player with regard to the living bacteria of these claims, *e.g.*, live active cultures starting at 10^7 to 10^{11} per gram of filling, such as yogurt powder with active cultures.

Initially, claims 27 and 44 are dependent and therefore patentable even over this combination since Player does not teach all the features of independent claims 26 and 38. Additionally, Lauro does not remedy certain deficiencies of Player. In particular, the composition of Lauro, like Player, is also stored at room temperature, and as such Lauro also fails to teach a composition that needs to be chilled to maintain the living culture for 45 days, as recited in claim 44. Also, Lauro specifically teaches that a concentration after testing

provided a concentration "as high as" 8×10^5 lactobacilli per gram of cream. On the contrary, claim 44 specifically recites that the bacteria concentration is over 10^6 /gram of the food composition after being chilled 45 days. While the Office Action takes pains to discuss the longer test of Lauro it overlooks the fact that Lauro's bacteria need only survive under *room temperature conditions*, while claim 44 specifically recites the surviving bacteria concentration of a more adverse chilled condition. Even Lauro does not achieve the high concentration of living bacteria after long-term chilling presently recited by claims 27 and 44, and of course, Player fails to teach this as well. More importantly, no motivation to combine Lauro with Player existed. Lauro teaches a dairy product, i.e., cream which inherently contains some water content, while Player, as previously discussed, teaches exactly the opposite: a *non-aqueous* processed composition. This combination is improper and clearly based on hindsight rejection. For these reasons, claims 27 and 44 are separately patentable, even over the combination of Player and Lauro.

Claims 26, 31-34, 39-41, 43, and 46 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 5,800,855 to Rosen ("Rosen") in view of U.S. Patent No. 5,145,697 to Cajigas ("Cajigas") on pages 5-7 of the Office Action. The Office Action now points out ice cream sandwiches at Col. 5, lines 1-6.

Initially, Applicants note that independent claim 38 is patentable over this combination. Rosen discloses a cream composition that includes about 13% cream cheese, about 24.5% cream, about 19.4% milk, about 10.3% condensed skim milk, about 32.2% liquid can sugar (21.5% dry can sugar along with 10.7% water may be substituted), 0.5% of a stabilizing system (which may contain salt), and 0.1% vanilla extract (*See, e.g.*, Example 1, column 5, lines 40-52). The stabilizing system may further include carob bean gum, guar gum, or carrageenan. First, Rosen fails to teach a milk derivative as presently recited. Indeed, as previously discussed, milk derivative is defined in the specification--and it does not include condensed skim milk--or any condensed milk for that matter. As such, Rosen's condensed skim milk fails to provide a teaching of a milk derivative. Thus, Rosen simply does not have a milk derivative, as presently claimed. Moreover, dependent claim 30 has been amended to recite a preferred embodiment where the milk derivative is present in an amount of 15 weight percent to about 20 weight percent, which Rosen also fails to teach even if condensed milk were erroneously considered to be a milk derivative based on a hindsight rejection.

Furthermore, Rosen fails to teach the amount of both the texturizing agent and the salt. While a single variable might be obvious to optimize, the need to optimize multiple

variables--and for a different purpose--is more than mere "routine experimentation" for one of ordinary skill in the art. Indeed, Rosen teaches frozen cheesecake ice cream, while the present invention recites a cream composition on a biscuit layer or between biscuit layers. Ice cream is a frozen material with different preparation requirements, different storage requirements, different transportation requirements, and the like. The motivation to achieve particular levels of texturizing agents and salt in Rosen is different than that for the claimed invention. Cajigas fails to remedy this deficiency since it is merely used to demonstrate various types of texturizing agents. For these reasons, the combination of Rosen and Cajigas does not disclose or suggest each and every feature of the present claims. For at least this reason, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn.

Dependent claim 45 was rejected under 35 U.S.C. § 103(a) as being obvious over Rosen in view of Cajigas and U.S. Patent No. 4,145,449 to Nelham ("Nelham") on page 7 of the Office Action. Nelham is relied on for the teaching of packaging ice cream sandwiches in hermetically sealed plastic coated sachets to maintain ice cream separate from the sandwich or biscuit to avoid soggy. While these references may very well be appropriately combined, they still fail to teach the features of the independent claims. Claim 45 recites all the features of claim 26 in addition to the sachet, and even if Nelham is combined with Rosen and Cajigas there is still no reasonable expectation of success in achieving the claimed invention due to Rosen's various deficiencies previously noted.

Claims 26-32, 35, 38, 42, and 46 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 4,721,622 to Kingham et al. ("Kingham") in view of an article titled "Yoghurt [sic] Science and Technology" by A.Y. Tamime et al. (1985) ("Tamime") for the reasons recited on pages 8-9 of the Office Action. Tamime is relied on solely for the teaching of a yogurt as a fermented dairy product as recited in claim 27 (Office Action at page 8, lines 9-11).

Kingham discloses a food product with a bread-like casing having a filling, with an optional barrier layer (*See, e.g.,* Abstract). Kingham teaches a large variety of filling materials, including a filling of cream cheese, double cream, milk, ground onions, salt, spices, maize starch, gelatin, and water (Example 1); and yogurt, dried cream, dried onion, modified starch, salt, pepper, dextrose monohydrate, disodium dihydrogen pyrophosphate, fat, emulsifier, gelatin, water, cooked bacon, and grated cheddar cheese (Example 2).

Kingham fails to disclose or suggest a milk derivative (as recognized in the final Office Action mailed December 20, 2001) and sugar as recited by the present claims.

Moreover, Kingham does not teach the aromatic products or texturizing agent of claims 33-34. Indeed, one of ordinary skill in the art would not necessarily have been motivated to substitute one amount of milk for a *different amount* of powdered milk. Furthermore, Kingham discloses a food product with a bread-like casing having a filling within the bread-like casing, *i.e.*, the food product of Kingham completely surrounds the filling. On the contrary, the present invention recites the cream filling disposed on a layer of biscuit, which is not disclosed or suggested by the bread-like casing around the filling. Also, Kingham fails to teach sugar, as presently recited, since it is directed to non-confectionery fillings. The continued use of Kingham as a primary reference is can be nothing other than an improper hindsight rejection based on these serious deficiencies of Kingham's teachings.

Player has *exactly the same deficiency* as Kingham insofar as it also fails to teach a milk derivative as presently recited. Player does teach the inclusion of a milk derivative in Examples 1 and 2, but it does not teach a sufficient amount in Example 2 and Example 1 fails to disclose or even suggest a variety of features presently claimed. As previously discussed, Player as a whole teaches away from the claimed invention to begin with. Moreover, Kingham also fails to teach salt content and sugar content, as discussed in responses to previous Office Actions. Player still contains this fatal deficiency with respect to a suitable salt content, since both references even if improperly combined still do not teach the claimed salt content as presently recited.

With respect to the lack of motivation for one of ordinary skill in the art to combine Kingham and Player, Applicants yet again point out that Player teaches non-aqueous compositions while Kingham includes a cream having a water content. Kingham and Player are simply not properly combinable based on the showing on the record. Only through a hindsight reconstruction of picking and choosing features from the disclosure of the present invention would one ever attempt to combine these disparate references.

Moreover, one of ordinary skill in the art would not have reasonably expected to achieve success in combining such disparate products to provide a cream composition disposed on at least one layer of a biscuit, as presently recited. It would not have been reasonable to take Kingham's non-confectionery food product, remove various filling components, substitute various other types and amounts of components for those as to which both references are silent, and expect to successfully obtain the presently claimed invention.

Further, even if an improperly combined Kingham and Player taught all features of the claim, which they do not, the transition language in claim 38 "consisting essentially of" specifically excludes various Kingham ingredients from the presently recited

cream composition, as they would materially affect the novel features of the invention. This language specifically excludes the onions and bacon of Kingham that make it completely irrelevant to the cream composition of the present invention. Thus, Kingham has been explicitly excluded from claim 38 by the transition language thereof, even if it were relevant. The Patent Office does not have the discretion to ignore claim language when it is inconvenient, and claim 38 specifically recites transition language that makes it clearly patentable over Kingham even when improperly combined with Player. The transition language also specifically excludes added water in the amount necessary to convert the milk derivative of the present invention to the milk disclosed by Kingham. The presence of moisture from other claimed components would at best provide some type of wet or pastry-textured powder, but would not be expected to be sufficient to provide milk. Indeed, too much water or the use of milk itself would have been expected to render the claimed biscuit layer undesirably soggy. For these reasons, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn since no *prima facie* case of obviousness has been demonstrated on the record.

The applicants have not invented the components that are combined in the presently claimed composition, so it is not difficult for the Examiner to locate disparate references that disclose these components and to improperly allege that a skilled artisan can combine them in an effort to obtain applicants' claimed invention. This, of course, is not how obviousness rejections can be properly made, since there must be some teaching in the references themselves that would motivate or lead the ordinary-skilled artisan to make the presently claimed invention. Here, Player is not at all relevant to the present invention, so the combination of Player with the other references is improper as there is no teaching or suggestion in the references themselves to make such a combination.

Accordingly, applicants now believe all claims are in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues and expedite allowance of this application.

A Petition for Extension of Time, with provision for the required fee, to extend the time for response to January 2, 2003 (since January 1, 2003 is a Federal Holiday) is also enclosed.

No fee is believed to be due for this response. Should any fees be required,
however, please charge such fees to Winston & Strawn Deposit Account No. 501-814.

Respectfully submitted,

12/26/02
Date

Jeffrey A. Wolfson
Jeffrey A. Wolfson (Reg. No. 42,234)
For: Allan A. Fanucci (Reg. No. 30,256)

WINSTON & STRAWN
Customer Number: 28765

(202) 371-5770

APPENDIX A: MARKED UP VERSION OF AMENDED CLAIMS

30. (Amended) The cream composition of claim 26, wherein the milk derivative comprises at least one of powdered unskimmed milk, powdered skimmed milk, sweetened evaporated milk, or combinations thereof, and the milk derivative is present in an amount of 15 weight percent to about 20 weight percent.

38. (Twice Amended) A cream composition consisting essentially of:
10% to 20% of a milk derivative;
8% to 30% of a sugar;
10% to 60% of a fermented dairy product;
0.01% to 25% of sour cream or dairy cream containing 25% to 45% of fatty substances;
0.01% to 35% of a texturizing agent;
0.01% to 20% of an aromatic product; and
0.01% to 0.5% of salt;

wherein the cream composition is disposed on at least one layer of a biscuit and wherein the cream composition must be refrigerated to provide a shelf life of at least 45 days.

46. (Amended) A food product comprising the cream composition of claim 26 disposed between two layers of biscuit each of which comprises cake, gingerbread, brioche roll, or Viennese bread or buns.